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RESOURCE MANAGEMENT  
2009 JUN -2 AM 10:47

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**STATE OF HAWAII**  
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HRD09/4344

May 26, 2009

Honorable Laura H. Thielen, Chairperson  
Ken C. Kawahara, Deputy Director  
Commission on Water Resource Management  
P.O. Box 621  
Honolulu, HI 96809

**RE: Request for comments on Wailuku Water Company, LLC's Surface Water Use Permit Application – Existing Use, Nā Wai `Ehā Surface Water Management Areas, Maui.**

Aloha e Laura H. Thielen and Ken C. Kawahara,

The Office of Hawaiian Affairs (OHA) is in receipt of the above-mentioned letter dated April 29, 2009 and appreciates the opportunity to comment on Wailuku Water Company, LLC's (WWC) Surface Water Use Permit Application (SWUPA) for an existing use in Nā Wai `Ehā's Surface Water Management Area.

As an initial matter, as the Commission is well aware, the establishment of the Interim Instream Flow Standards (IIFS) for Nā Wai `Ehā streams is currently pending and will determine how much water must be restored to and remain in these streams for public trust purposes, including the exercise of traditional and customary Hawaiian rights and appurtenant rights. Until the IIFS are established, the amount of water available for offstream uses is not known. Accordingly, it cannot yet be ascertained whether all existing uses can continue to be accommodated. *See, e.g., In re Waiāhole Ditch Combined Contested Case Hearing*, 94 Hawai'i 97, 149, 9 P.3d 409, 461 (2000) (observing that existing uses are not "grandfathered" under the constitution and the Code and stating that "the public trust authorizes the Commission to reassess previous diversions and allocations, even those made with due regard to their effect on trust purposes," and that, in setting the IIFS, "the Commission may reclaim instream values to the inevitable displacement of existing offstream uses" (emphasis added)). Nor can it be determined

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whether there are “competing applications” within the meaning of HRS §§ 174C-50(h) and -54. Therefore, the SWUPAs for existing uses of Nā Wai `Ehā stream water should not be considered until the IIFS are established. Once that occurs, the SWUPAs should be considered concurrently; in other words, WWC should not have any priority simply by virtue of the fact that it filed its SWUPA earlier than other existing users.

OHA objects to WWC’s SWUPA, which seeks an existing use permit to allow it to continue wasting in excess of 3 million gallons per day (mgd) of water diverted from Nā Wai `Ehā streams. This is the amount WWC estimates as “system losses” in its ditch system, based on a consultant’s review of its system in 1988. (According to testimony at the IIFS contested case hearing, WWC has made no attempt to monitor its current actual system losses. (Tr. 12/14/07 (Suzuki), p. 164, l. 11 to p. 165, l. 23; p. 169, ll. 9-12.)) WWC’s SWUPA does not give any indication that WWC has even attempted to meet its burden to demonstrate that this use is reasonable-beneficial; i.e., that the level of system losses is necessary and cannot be mitigated by practicable measures.

According to WWC’s testimony in the IIFS contested case hearing, its ditch system includes 20.3 miles of open ditches and tunnels which, except for a portion of the `Īao-Waikapū Ditch, are unlined (Suzuki WDT 9/14/07, p. 2), and 16 or 17 reservoirs, all of which are unlined. *Id.*, p. 6; Tr. 12/14/07 (Suzuki), p. 162, l. 25 to p. 164, l. 10. Many of the reservoirs are simply kept full and no longer serve any storage function, or indeed any function at all given that users could just as easily take water directly from the ditches as from the reservoirs. Tr. 2/22/07 (Santiago), p. 132, l. 3 to p. 135, l. 16. WWC testified that, in the short term, “we have no plans for lining” any of the reservoirs or unlined portions of the ditches, but “we may have [plans] in the future.” Tr. 12/14/07 (Suzuki), p. 168, l. 21-25. WWC has made no attempt to show, as is its burden to show, that it is impracticable to reduce its system losses.

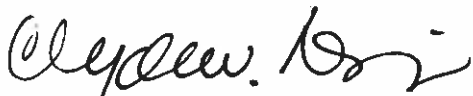
OHA also notes that WWC’s claim to appurtenant rights, to the extent it is intended to have any bearing on WWC’s SWUPA for system losses, is meritless. An appurtenant right is a right to use water, and WWC has acknowledged it does not use Nā Wai `Ehā water. Moreover, even if appurtenant rights could be applicable to waste, “the right to the use of water acquired as appurtenant rights may only be used in connection with that particular parcel of land to which the right is appurtenant.” *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 191, 504 P.2d 1330, 1341 (1973) (subsequent history omitted).

OHA is the “principal public agency in this State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians.” (Hawaii Revised Statutes (HRS) § 10-3(3)). It is our duty to “[a]ssess[] the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conduct[]

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advocacy efforts for native Hawaiians and Hawaiians.”<sup>1</sup> (HRS § 10-3(4)). As such, we thank you for the opportunity to comment, and for your diligent efforts to protect these public trust resources. If you have further questions, please contact Grant Arnold by phone at (808) 594-0263 or e-mail him at [granta@oha.org](mailto:granta@oha.org).

‘O wau iho nō me ka ‘oia‘i‘o,



Clyde W. Nāmu‘o  
Administrator

C: OHA CRC Maui

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<sup>1</sup> OHA is a party in the on-going ‘Iao Ground Water Management Area High Level Source Water Use Permit Applications and Petition to Amend Instream Flow Standards of Waihe‘e, Waiehu, ‘Iao, and Waikapū Streams Contested Case Hearing (Case No. CCH-MA06-01) (“IIFS contested case”) and has numerous beneficiaries have property interests in, and/or use surface water from, the the ‘Iao, Waihe‘e, Waiehu, and Waikapū surface water management areas.